89-482

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

BARBARA ANN WASHINGTON, AS GUARDIAN AD LITEM FOR CHRISTA M. WASHINGTON, A MINOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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30 pp

QUESTION PRESENTED

In this case, the court of appeals held that while two off-duty servicemen on a military base were working on a car owned by one of them, they were acting "within the scope of [their] * * * employment" within the meaning of the Federal Tort Claims Act, 28 U.S.C. 1346(b). The question presented is whether, in grounding this determination on the assertedly "unique" character of a military base, the court of appeals erroneously failed to determine whether under state law an analogous private employer would be liable under similar circumstances.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 868 F.2d 332. The opinion of the district court (App., *infra*, 8a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1989. A petition for rehearing was

denied on June 9, 1989 (App., *infra*, 16a). On September 5, 1989, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including September 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1346(b) (28 U.S.C.) provides, in pertinent part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for * * * personal injury * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2671 (28 U.S.C.) provides, in pertinent part:

> "Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States * * *, means acting in line of duty.

Section 2674 (28 U.S.C.) provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

STATEMENT

The facts are not disputed. On the evening of September 19, 1980, Larry Bartole and Neil Cleaves were in the garage of Cleaves' residence on the Point Mugu, California, naval base, attempting to start the engine of Cleaves' 1964 Rambler. Both men were active-duty members of the Navy on authorized liberty status, having completed their work for the day. In attempting to start the car, "neither Mr. Bartole nor Mr. Cleaves [was] performing any action connected with any of their official United States Navy duties." App., *infra*, 9a; see *id.* at 2a-3a; Tr. 25-26 (Pltf. Stip.)). When Bartole poured gasoline from a coffee can into the carburetor in an attempt to prime it, the engine backfired. Flames shot from the carburetor, igniting the gasoline in the can Bartole was holding. Gasoline spilled as Bartole jerked the can back, and his hand caught fire. Bartole then turned toward the side door of the garage, tripped, and spilled the can of flaming gasoline out of the door. Ten-year-old Christa Washington was just outside the door playing in the adjacent yard. She was struck by the flaming gasoline and was seriously burned. App., *infra*, 2a-3a, 9a-10a.

Suit to recover for Christa Washington's injuries was brought against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 (b), 2671 *et seq.* That Act provides, in Section 1346(b), that the United States is liable for "personal injury * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place

where the act or omission occurred." Following a trial, the district court held that "[n]o act or omission of any employee of the United States of America, while acting within the course and scope of his office or employment, caused, or in any way contributed to, the accident." App., *infra*, 15a. The court first noted that "[s]cope of employment for an active duty military employee means 'acting in the line of duty.' See 28 U.S.C. § 2671. The phrase 'line of duty,' in turn, is defined by the applicable state law of *respondeat superior*." *Id.* at 12a (citing *Williams* v. *United States*, 350 U.S. 857 (1955)). It then concluded that, "[u]nder the principles of *respondeat superior*, in California, the acts of Mr. Bartole and Mr. Cleaves herein, in attempting to start the privately owned Rambler automobile in their off-duty hours, were clearly their own, and done for personal purposes, totally unrelated to any United States Navy job or duty[,] * * * [and] thus [were] not within the course and scope of the employment of Mr. Bartole and Mr. Cleaves with the United States." App., *infra*, 12a. The district court added: "The imposition of *respondeat superior* liability upon the United States in this case would clearly be an imposition upon the military of a liability far broader than that of a private employer, and would be clearly contrary to the limited waiver of sovereign immunity attended by the Federal Tort Claims Act." *Id.* at 13a.[1]

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[1] The district court also held that the United States was not liable under California law as Christa Washington's landlord or as the owner of the land on which she was injured, because it "had no knowledge of the danger, [and did not] participate in any way in creating it." App., *infra*, 15a.

The court of appeals reversed. App., *infra*, 1a-7a. It noted that base regulations in effect at the time of the accident provided that residents were not to conduct " '*Fire Hazardous Operations* * * * prior to the establishment of adequate fire prevention measures.' " *Id.* at 4a.[2] The court then added that, in *Lutz* v. *United States*, 685 F.2d 1178, 1183 (9th Cir. 1982), it had concluded that "[m]ilitary housing presents a unique situation' " (App., *infra*, 5a), and in that case found that "the control of a serviceman's dog was * * * a military duty imposed for the benefit of the Air Force by Air Force regulations on the dog's owner who was in base housing" (*id.* at 6a). The court here held: "In our case the duty to adhere to fire regulations and not to engage in fire hazardous operations without the establishment of adequate fire prevention measures was a military duty imposed for the benefit of the Navy by Navy regulations * * *. The Navy is therefore responsible for [Bartole's and Cleaves'] actions." *Ibid.* After concluding that Bartole and Cleaves had negligently violated the regulations, the court remanded "for the limited purpose of determining" the amount of respondent's damages. *Id.* at 7a.

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[2] The court also referred to a regulation providing that " 'only repairs of a minor nature * * * may be accomplished in public quarters, garages, or the hobby shop spaces' " (App., *infra*, 3a), and noted that the regulations further stated: " '[T]he prevention of fire in administrative and quarters areas is a moral and legal responsibility of all personnel, requiring alertness, strict adherence to fire regulations, and intelligent application of fire prevention safeguards. Fire hazards are not acceptable within the naval establishment. The goal of fire prevention and protection programs is the *total prevention* of loss of life and property by fire.' " *Id.* at 3a-4a.

REASONS FOR GRANTING THE PETITION

In three recent cases, including this one, the Ninth Circuit has expanded the liability of the United States by making the government responsible whenever damage results from conduct that violates a base regulation. In each instance, the court reversed a district court dismissal of the action based on a determination that an analogous private employer would not be liable under state law. Here, the court concluded that two servicemen working on a personal car on their own time were acting within the scope of their employment because a base regulation governed "fire hazardous operations." In *Lutz*, on which the court here relied, it concluded that a base regulation governing the control of privately owned pets made an airman's failure to control his dog an activity performed within the scope of his employment. And in *Doggett* v. *United States*, 875 F.2d 684, 688 (9th Cir. 1989), the court, also relying on *Lutz*, concluded that servicemen drinking in a tavern on a naval base were acting within the scope of their employment when they failed to detain an intoxicated companion, as authorized by a base regulation. These decisions, which contrast sharply with the approach followed in other circuits, have the effect of turning the United States into a virtual insurer of the conduct of members of the service on military bases. They ignore the vital distinction between, on the one hand, housekeeping and safety regulations—regulations resulting from the fact that many people not only work on a military base but also live there (often with their families)—and, on the other hand, rules governing the conduct of service members on the job.

1. In each of these cases, the Ninth Circuit has erred, as a matter of federal law, by failing to con-

sider whether an analogous private employer would be liable under state law. The FTCA provides that "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. However, rather than analyzing the case under state law, the court in *Lutz* stated that "[m]ilitary housing presents a unique situation." 685 F.2d at 1183. The court repeated that statement in this case. App., *infra*, 5a. In *Doggett*, also relying on *Lutz*, the court "emphasize[d] that the regulation governs conduct only on the military base." 875 F.2d at 688. Having concluded that military bases are "unique," in none of the three cases did the court of appeals satisfy the requirement of the FTCA by determining whether a state court would hold a private employer liable in similar circumstances.[3]

Military bases are not unique in the respects noted by the court of appeals. Private employers likewise own property and make rules to govern the conduct of employees while on that property, even when they are not on duty; indeed, private employers sometimes house employees (and their families) on company property.[4] The court of appeals should therefore have

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[3] In this case, the only citation to state law in the court of appeals' opinion is to a case stating a general proposition of California law. App., *infra*, 5a (citing *Jeffrey Scott E.* v. *Central Baptist Church*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (1988)).

[4] See, *e.g.*, *Martinez* v. *Hagopian*, 182 Cal. App. 3d 1223, 1230, 227 Cal. Rptr. 763, 767 (Cal. App. 1986) (refusing to hold an employer liable for a tort caused by a farmworker, since "[t]o hold otherwise would be to essentially impose a theory of strict liability on the employer for all employee torts during after-hours social activities on the employer's premises, a result not permitted under settled law").

considered whether a private employer in California would be liable if an employee, while off duty and engaged in personal affairs on the employer's property, caused an injury because he did not take adequate safety precautions as required by the employer's regulations.[5] Here, the district court judge, who formerly sat on the California Superior Court and the California Municipal Court, stated that "[t]he imposition of *respondeat superior* liability upon the United States in this case would clearly be an imposition upon the military of a liability far broader than that of a private employer" under California law. App., *infra*, 13a.[6]

2. In addition, the Ninth Circuit's repeated reliance on base regulations is misplaced. Servicemen cannot be said to be acting within the scope of their employment merely because they reside on a base and are subject to base regulations. That the Navy was not acting as Bartole's and Cleaves' employer in issuing the regulations on which the Ninth Circuit relied is made clear in this case by the fact that the fire regulations are not directed solely to employees but

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[5] As the district court in this case recognized (App., *infra*, 12a), the significance of the distinction between a service member's on-duty and off-duty activities is underscored by 28 U.S.C. 2671, which limits "scope of his office or employment" for active duty military employees to actions "in [the] line of duty." For the relevance of state law to this determination, see *Williams* v. *United States*, 350 U.S. 857 (1955).

[6] We are not asking the Court to decide whether the district court's understanding of state law is correct. Rather, since we contend that the court of appeals erroneously failed to determine whether an analogous private employer would be liable under state law, we ask the Court to reverse and remand with instructions that the court of appeals make that determination.

to all "Public Quarters Residents." C.A. E.R., Exh. D, at 3. Surely, a service member's spouse or child who violates a fire regulation while trying to fix the family car could not be held on that basis to have been acting within the scope of anyone's employment.

In a case very much like *Lutz*, involving an attack by a dog owned by a serviceman, the District of Columbia Circuit understood the difference between regulations governing employees and regulations governing residents. After noting that, in addition to pet-control requirements, the base regulations "require[d] base residents to use certain size pots and pans, to replace electrical fuses, and to refrain from smoking in bed," the court stated that "[t]hese duties are not imposed by the military in its role as an employer and they do not run to the employer's benefit." *Nelson* v. *United States*, 838 F.2d 1280, 1283-1284 (D.C. Cir. 1988).[7] The District of Columbia Circuit expressly disagreed with the approach taken by the Ninth Circuit. It stated: "There seems * * * to be no principled limit to the reasoning in *Lutz*, so that the case would seem to make the government an insurer as to all manner of bizarre incidents. * * * To hold the government potentially liable for all damage done by conduct on a military base that violates any one of the many base regulations would expand liability in ways inconsistent with the idea that the FTCA must be strictly interpreted as a limited relinquishment of sovereign immunity." *Id.* at 1284.[8]

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[7] The court in *Nelson* went on to hold that the government was liable as landowner for failure to remove or control a dog that responsible officials knew was dangerous. 838 F.2d at 1285-1286.

[8] In criticizing the Ninth Circuit's approach, the District of Columbia Circuit noted that "whether a breach of military

Thus, there is an express conflict in the circuits on the question presented.[9]

Although the Ninth Circuit stated in *Lutz* that it was "not suggest[ing] that every act of a base resident is within the scope of his employment" (685 F.2d at 1183), that suggestion is contradicted by the decisions here and in *Doggett*. At least when there is a relevant base regulation governing the conduct of those on base property, the prediction of the D.C. Circuit in *Nelson* (838 F.2d at 1284) is being fulfilled: in the Ninth Circuit, the government has become "an insurer as to all manner of bizarre incidents" occurring on military bases.[10] Indeed, under *Lutz*, this development was almost inevitable, since "[m]ilitary regulations typically govern a wide range of base residents' activities, touching most aspects of

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regulations subjects the government to tort liability must depend upon whether analogous duties exist under local tort law." 838 F.2d at 1284. It thus rejected the notion that military bases are unique, so that state law need not be consulted in determining whether the United States is liable under the FTCA.

[9] In *Piper* v. *United States*, 694 F. Supp. 614, 618 (E.D. Ark. 1988), another case involving injuries caused by a dog, the court concluded that since a base regulation governed control of pets, "[t]he analysis by the Ninth Circuit Court of Appeals in *Lutz* * * * is applicable to the facts developed." The court added, "but *compare, Nelson* v. *U.S.*" *Ibid.* *Piper* is currently pending on appeal in the Eighth Circuit. No. 88-2612 (argued June 16, 1989).

[10] The First Circuit long ago rejected the argument that "anything [a serviceman] was doing in the residence was in the scope of his employment." *Merritt* v. *United States*, 332 F.2d 397, 399 (1964). In that case, a fire was caused by a serviceman who was smoking in bed.

private and public life." 838 F.2d at 1284.[11] The Ninth Circuit's unwarranted expansion of the federal government's waiver of sovereign immunity requires correction by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1989

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[11] The base regulations in this case confirm the District of Columbia Circuit's statement. For example, regulations at the Point Mugu Naval Base prohibit the attachment of extension cords to coffeemakers, require lint traps in clothes dryers to be cleaned often, and warn residents to "religiously" observe speed limits on the base. C.A. E.R., Exh. B, at 34, 35.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-5728

D.C. No.

CV-83-2332-RSWL

BARBARA ANN WASHINGTON, individually, and as Guardian Ad Litem for: CHRISTA M. WASHINGTON, a minor, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

[Filed Feb. 21, 1989]

OPINION

Before: JAMES R. BROWNING, MARY M. SCHROEDER and JOHN T. NOONAN, JR., Circuit Judges.

OPINION

NOONAN, Circuit Judge:

Barbara Ann Washington brought suit on her own and her minor daughter Christa's behalf against the United States of America (the government) and two members of the United States Navy, Larry Bartole and Neil Cleaves, for injuries suffered by Christa at the U.S. Naval Housing Quarters, Point Mugu, California. Jurisdiction was under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. The mother's claim was dismissed for lack of subject matter jurisdiction because she had not filed an administrative tort claim with the Navy, 38 U.S.C. § 2675(a). Christa's claim was tried to the court, which made findings of fact and conclusions of law and entered judgment for the government. Christa Washington appeals. We reverse.

FACTS

At 6:40 p.m., September 19, 1980, in the base housing facilities of the Navy at Point Mugu, California, two active duty members of the Navy, Larry Bartole and Neil Cleaves, were attempting to start Cleaves' 1964 Rambler. The car was in the garage assigned to Cleaves. It had not been operative for several months. Cleaves had given it a basic tune-up and oil change and it still would not run.

The main garage door was closed; a side door was open. Cleaves was in the car, turning on the ignition when he thought appropriate. Bartole tried to prime the carburetor by pouring gasoline from a coffee can into the throat of the carburetor. The engine backfired. Flames shot from the carburetor. Bartole jerked the can back and spilled gas over his hand.

His hand caught fire. He ran to the side door, tripped, and sent the blazing can out the door into the yard. Christa Washington was just outside the door. She was struck by the fiery gasoline. It severely burned the right side of her head, face and neck and right shoulder, arm, wrist and hand.

At the time of the incident Bartole and Cleaves were on authorized liberty status and had completed their ordinary work for the day for the Navy. Christa, aged ten, was the daughter of a serviceman residing in a naval housing unit at Point Mugu. Her family's unit was directly across from Cleaves'. The great majority of the 567 housing units at the base were occupied by families with more than one child.

A Navy regulation provided that "only repairs of a minor nature, such as basic tune-up, lube adjustments and oil changes may be accomplished in public quarters, garages or the hobby shop spaces." A booklet issued to all servicemen housed on the base carried an introductory message from Captain James E. Webb, commanding officer of the Naval Air Station. Captain Webb stated: "This brochure provides . . . the necessary regulations and rules for your assistance and guidance throughout your stay in government quarters." Within this booklet a section was entitled, "Fire, Safety and Police Regulations" and contained directions on the storage of gasoline but nothing specifically on the use of gasoline to prime carburetors.

Other regulations issued on January 5, 1979 and in effect at the time of the incident were explicitly directed to fire prevention. These regulations provided that "the prevention of fire in administrative and quarters area is a moral and legal responsibility

of all personnel, requiring alertness, strict adherence to fire regulations, and intelligent application of fire prevention safeguards. Fire hazards are not acceptable within the naval establishment. The goal of fire prevention and protection programs is the *total prevention* of loss of life and property by fire" (emphasis in original). These regulations specified that "Public Quarters Residents" were responsible for "compliance with Fire Regulations" and "application of fire prevention safeguards in Quarters, housing, and facilities." The Fire Regulations that accompanied this regulation stated: "*Fire Hazardous Operations* shall not be conducted prior to establishment of adequate fire prevention measures and approved by the Fire Chief." (emphasis in original).

A report to the navy on the accident by Ensign David M. Anderson, Jr. stated that "[a]n accepted primer spray should have been used rather than gasoline to prime the carburetor . . . [U]sing an open coffee can to pour the gas was a contributing factor in the accident;" and that "using gasoline to prime the carburetor is not a safe practice but is relatively common."

ANALYSIS

The Federal Tort Claims Act waives the government's immunity to a suit for personal injuries caused by an "employee of the Government while acting within the scope of his office or employment. . . ." 28 U.S.C. § 1346(b). The scope of employment of a military member "means acting in line of duty." 28 U.S.C. § 2671. The military "line of duty" is defined by the applicable state law of respondeat superior. *United States v. Lutz*, 685 F.2d 1178, 1182 (9th Cir. 1982). Where as here, the facts of

the incident are not in dispute, the determination of the scope of employment is a question of law, reviewable de novo. *Id.* In this case California law applies. California defines "scope of employment" very broadly. *Doggett v. United States*, No. 86-6109, slip op. at 12432 (9th Cir. Oct. 3, 1988). The California test for determining scope of employment "turns on whether '(1) the act performed was either required or "incident to his duties" . . ., or (2) the employee's misconduct could be reasonably foreseen by the employer in any event.'" *Id.* (quoting *Jeffrey Scott E. v. Central Baptist Church*, 197 Cal. App.3d 718, 243 Cal. Rptr. 128, 129 (1988).

The United States invokes *Hartzell v. United States*, 786 F.2d 964 (9th Cir. 1986), in which the negligent driving of an Air Force sergeant on vacation but en route to a new assignment was held not to be within the scope of her employment by the Air Force. Under the applicable state law, that of Arizona, this result was mandated. Moreover, as this court observed, it would be inconsistent with the limited waiver of immunity intended by the Federal Tort Claims Act to make the United States liable for "virtually any tort committed by a serviceman." *Id.* at 969. *Hartzell*, however, did not address the extent of military duty to assure security in military housing.

Our case involves the same considerations that governed the court in deciding *Lutz, supra.* In that case we said:

> Military housing presents a unique situation. Unlike employees and residents of cities and towns, the employment relationship of residents of military bases continues even during the off-duty at-home hours. We do not suggest that

> every act of a base resident is within the scope of his employment. Such a rule would impose upon the military a liability far broader than that of a private employer, contrary to the limited waiver intended by the FTCA. However, we agree with the Fifth Circuit that claims involving base residents require close examination of the employee's actions and the employer's interest in them.

Id. at 1183 (citations omitted).

In *Lutz* the control of a serviceman's dog was found to be a military duty imposed for the benefit of the Air Force by Air Force regulations on the dog's owner who was in base housing. In our case the duty to adhere to fire regulations and not to engage in fire hazardous operations without the establishment of adequate fire prevention measures was a military duty imposed for the benefit of the Navy by Navy regulations on servicemen in the Point Mugu naval housing. It is difficult to think of an older or more critical military duty imperative than the prevention of fire in camps or quarters. At all times on the housing base Bartole and Cleaves had the duty to act in conformity with the regulations designed to prevent fire. Their liberty status did not relieve them of the continuing duty to comply with the fire regulations governing military personnel who were "Public Quarters Residents." The Navy is therefore responsible for their actions in securing the base against fire hazards.

Bartole and Cleaves in fact violated the regulations and did so by employing a reckless method of priming the engine. Their negligence endangered all

within a short radius of their activity. Christa Washington was within that range and was injured as a proximate result of their negligent acts. Accordingly we reverse the judgment in favor of the United States and remand for the limited purpose of determining her damages.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-2332-RSWL

BARBARA ANN WASHINGTON, ETC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Dec. 11, 1987; Entered Dec. 14, 1987]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. This Federal Tort Claims Act action arises out of an incident which occurred on September 19, 1980, at approximately 6:40 P.M., in base housing facilities provided by the United States Navy at Point Mugu, California.

2. On September 19, 1980, at approximately 6:40 P.M., Messrs. Larry Bartole and Neil Cleaves were attempting to start the engine of Mr. Cleaves' 1964 Rambler automobile in Mr. Cleaves' garage, which

was located in base housing facilities at Point Mugu. At the time of the incident, Messrs. Bartole and Cleaves were attempting to start the engine of the Rambler, and in attempting to do so were pouring gasoline into the carburetor thereof from a coffee can.

3. At the time of the incident, Mr. Bartole was an active duty member of the United States Navy assigned to the Air Test and Evaluation Squadron 4 (VX-4), Pacific Missile Test Center, Point Mugu, California. At the time of the incident, Mr. Bartole was in authorized liberty status, having completed his work for the United States Navy for the day.

4. At the time of the incident giving rise to this suit, Mr. Neil Cleaves was also an active duty member of the United States Navy, and was assigned to the VXE-6 Squadron at Point Mugu Pacific Missile Test Center. At 6:40 P.M. on September 19, 1980, Mr. Cleaves was also in authorized liberty status, having completed his assigned work that day for the Navy.

5. In attempting to start the engine of the 1964 Rambler automobile, neither Mr. Bartole nor Mr. Cleaves were performing any action connected with any of their official United States Navy duties. The act of attempting to start the automobile by pouring gasoline into the carburetor was done purely for the private benefit of these individuals, and were purely private purposes, unrelated to any official military activity.

6. After Mr. Bartole poured gasoline into the carburetor of Mr. Cleaves' Rambler, attempting to prime it so that the engine would start, the engine backfired, and the flame from the carburetor ignited the gasoline held in the coffee can in Mr. Bartole's hand.

Mr. Bartole's hand caught fire from the gasoline when he jerked the can back and spilled gasoline over it. Mr. Bartole then pivoted toward the side door of the garage, tripped over something, thereby spilling the flaming can of gasoline out of the side garage door. The plaintiff, Christa M. Washington, a minor at the time, was just outside this side door playing in the yard adjacent to the garage, and was struck by the flaming gasoline.

7. The gasoline contained in the coffee can which Mr. Bartole was utilizing to prime the carburetor of the vehicle had, immediately prior to the incident, been properly stored in a one-gallon gasoline storage container. Immediately prior to the incident, a small portion of the gasoline was poured from this storage container into the coffee can. The aforesaid fire resulted from the use of the gasoline to prime the carburetor, and not from any act of improper storage of the gasoline.

8. Plaintiff Barbara A. Washington never filed an administrative tort claim with the United States Navy.

9. The above-described act of Messrs. Bartole and Cleaves in priming the carburetor with gasoline in their attempt to start the engine of the automobile did not constitute a repair of the automobile.

10. Even assuming, *arguendo*, that the aforesaid act of priming the carburetor of the automobile could be said to constitute a repair thereof, said act did not constitute a "major repair," as contemplated by applicable Navy regulations.

11. Neither Mr. Bartole nor Mr. Cleaves was acting within the course and scope of his employment with the United States Navy at the time of, or with respect to, the incident giving rise to this suit.

12. In connection with the incident giving rise to this suit, there was absolutely no assignment by the United States Navy to either Mr. Bartole and/or Mr. Cleaves, through regulation or otherwise, of a specific military duty in re the starting of the Rambler automobile engine, the performance of which furthered the interests of the United States Navy.

13. The incident giving rise to this suit did not result from a dangerous condition of which the United States had knowledge, nor did any "condition" herein (i.e. the use of gasoline to prime the carburetor of the engine) exist for such a long time that if the United States had exercised reasonable care in inspecting the premises, it would have discovered the condition in time to remedy it, or to give warning before any injury occurred. No employee of the United States was aware of the actions of Mr. Bartole and Mr. Cleaves in priming the carburetor of the Rambler with gasoline in an attempt to start it. Indeed, because the facts adduced demonstrate that the outside garage door was closed at the time of the incident, the United States was incapable of seeing the actions of these gentlemen, or of taking any steps to prevent such actions.

14. Because plaintiff Christa M. Washington is the dependent daughter of an active duty enlisted member of the United States Navy, her medical bills have, in large part, been paid by the United States pursuant to the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), Chapter 55, Title 10, United States Code, §§ 1071 through 1089. As of the date of trial, a total of $237,983.43 has been paid by CHAMPUS for medical bills for Christa Washington arising out of the incident giving rise to this suit.

15. No negligent or wrongful act of any employee of the United States of America while acting within the course and scope of his office or employment caused, or in any way contributed to, the damage alleged by plaintiffs.

16. Any of the foregoing Findings of Fact deemed to be Conclusions of Law are hereby incorporated into the Conclusions of Law.

CONCLUSIONS OF LAW

1. The Federal Tort Claims Act constitutes a waiver of the government's immunity to suit only as to personal injuries caused by "an employee of the government while acting within the scope of his office or employment . . . ." See 28 U.S.C. § 1346(b). Scope of employment for an active duty military employee means "acting in the line of duty." See 28 U.S.C. § 1346(b). Scope of employment for an active duty military employee means "acting in the line of duty." See 28 U.S.C. § 2671. The phrase "line of duty," in turn, is defined by the applicable state law of *respondeat superior*. *Williams v. United States*, 350 U.S. 857 (1955); *Dornan v. United States*, 460 F.2d 425, 427 (9th Cir. 1972).

2. Under the principles of *respondeat superior*, in California, the acts of Mr. Bartole and Mr. Cleaves herein, in attempting to start the privately owned Rambler automobile in their off-duty hours, were clearly their own, and done for personal purposes, totally unrelated to any United States Navy job or duty. The act of attempting to start the vehicle by priming its carburetor was thus not within the course and scope of the employment of Mr. Bartole and Mr. Cleaves with the United States. *Proietti v. Levi*, 530 F.2d 836, 840 (9th Cir. 1976); *Obst v. United States*

Postal Service, 427 F. Supp. 696, 698 (N.D. Cal. 1977); *Kish v. California State Auto Association*, 190 Cal. 256, 212 P. 27 (1922).

3. The reliance by plaintiffs upon the rationale embodied in *Lutz v. United States*, 685 F.2d 1178 (9th Cir. 1982) to establish liability on the part of the United States herein is misplaced. Where, as here, the conduct of Mr. Bartole and Mr. Cleaves did not involve a regular and specific military activity, the special characteristics of military employment do not bring their act of priming this private automobile with gasoline within the course and scope of their United States Naval employment for purposes of the Federal Tort Claims Act. This case is distinguishable from *Lutz* because the priming of the carburetor of the automobile in an attempt to start it did not violate any applicable Naval regulation. Moreover, even if said act did violate some applicable regulation, planitiffs have failed to show that any such regulation involved delegations to Cleaves and Bartole of specific military duties, the performance of which furthered the interests of the United States Navy. The imposition of *respondeat superior* liability upon the United States in this case would clearly be an imposition upon the military of a liability far broader than that of a private employer, and would be clearly contrary to the limited waiver of sovereign immunity attended by the Federal Tort Claims Act.

4. The defendant, United States of America, is not liable under *respondeat superior* based upon the "risk of the enterprise" doctrine because there is not a sufficient nexus between the employment of Cleaves and Bartole and their act of priming the carburetor which resulted in the injury to Christa Washington. A sufficient nexus cannot be found to exist under

these facts because the act of priming the carburetor was not foreseeable in light of the duties Cleaves and Bartole were hired to perform. *Martinez v. Hagopian*, 182 Cal. App. 3d 1223, 227 Cal. Rptr. 763 (1986).

5. The defendant, United States of America, is not liable herein on any theory of direct liability. This defendant, as a landlord, with respect to the government provided housing herein, is under a duty to exercise ordinary care in the use, maintenance, or management of such premises in order to avoid exposing parties to an unreasonable risk of harm. This duty of care, however, is owed only to such persons as the landlord, as a reasonably prudent person, under the same or similar circumstances, should have foreseen would be exposed to such a risk of harm. Additionally, the United States herein, as landlord, is not liable for an injury suffered by a person on its premises which resulted from a dangerous condition of which the landlord had no knowledge, unless the condition existed for such a long time that if the landlord had exercised reasonable care in inspecting the premises it would have discovered the condition in time to remedy it or to give warning before the injury occurred. *Bridgman v. Safeway Stores, Inc.*, 2 Cal. Rptr. 146; see also BAJI 8.20 (1977 Rev.). The facts of this case demonstrate that the United States had no knowledge of the act of priming the carburetor, giving rise to this suit, and, further, that said act did not exist for such a long time that, in the exercise of reasonable care in inspecting the premises, the United States would have discovered it.

6. The United States herein is also not subject to liability to plaintiff for physical harm caused by any dangerous condition which came into existence (as

here) after the lessee had taken possession, where the United States had no knowledge of the danger or participated in any way in creating it. See *Thompson v. United States*, 592 F.2d 1104 (9th Cir. 1979).

7. The claims of plaintiff Barbara Washington herein must be dismissed for want of subject matter jurisdiction. This plaintiff did not file an administrative tort claim, which is an absolute prerequisite to the subject matter jurisdiction of this Court against the United States under the Federal Tort Claims Act. See *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974).

8. No act or omission of any employee of the United States of America, while acting within the course and scope of his office or employment, caused, or in any way contributed to, the accident and the injuries alleged herein. Accordingly, judgment should be rendered herein in favor of the United States of America.

9. Any of the foregoing Conclusion [*sic*] of Law deemed to be Findings of Fact are hereby incorporated into the Findings of Fact.

DATED: December 10, 1987.

/s/ Ronald S. W. Lew

RONALD S. W. LEW
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-5728

DC# CV-83-2332-RSWL

BARBARA ANN WASHINGTON, individually, and as Guardian Ad Litem for: CHRISTA M. WASHINGTON, a minor, PLAINTIFF-APPELLANT

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed June 9, 1989]

ORDER

Before: BROWNING, SCHROEDER, and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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